PUBLIC PROSECUTOR

v.

KARPAL SINGH RAM SINGH & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR ACTING LP
HASHIM YEOP SANI
HARUN HASHIM SCJ
[CRIMINAL APPEAL NO. 20 OF 1988 &
CRIMINAL APPLICATION NO. 54-1-88]
19 JULY 1988

ADMINISTRATIVE LAW: *Habeas corpus - Appeal against order of release granted - Distinction between grounds of detention and allegations of fact upon which the subjective satisfaction is based - Subjective test should be applied - Flaw in one of the six allegations of fact - Vagueness of language - Mere surplusage.*

CRIMINAL PROCEDURE: *Section 374 CPC - Right to appeal only to an aggrieved person - Section 50(1) Courts of Judicature Act 1964 - Appeal by any person convicted or otherwise found guilty.*

CONSTITUTIONAL LAW: *Internal Security Act - Rule 93(1) - Exercise of discretion to allow presence of detainee in Court - Detainee a witness - Failure of justice - Valid reasons in support.*

This is an appeal against the High Court of Ipoh's order directing the release of the respondent. At the hearing, the DPP raised 2 preliminary objections *viz* to the notice of appeal filed by Mr. Karpal Singh (the respondent) and to the presence of respondent at the hearing of the appeal. The Court resolved the issues in the following manner:

1) Respondent who had succeeded in his application is not an aggrieved person within s. 374 CPC. Section 50(1) of the Courts of Judicature Act 1964 precludes the appeal too. Respondent's appeal struck out.

2) Rule 93(1) envisages the exercise of Courts discretion requiring the presence of the detainee where the detainee is a necessary witness or where it would occasion a failure of justice if presence is denied to enable detainee to argue his case. The presence of the detainee is necessary having regard to the whole of the circumstance of the case.

Held:

[1] The learned Judge failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. The allegations of fact upon which the subjective satisfaction is based are not open to challenge or judicial review. The Judge had failed to apply the correct test i.e. the subjective test.

[2] The time issue here was simply this what was the effect of a flow in one of the six allegations of fact. Ong CJ in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* was not concerned with the question before the learned Judge in this present case.

[3] Reasonable cause exists solely in the mind of the Minister and his decision cannot be challenged unless it can be shown that he does not hold the opinion which he professes to hold. From the affidavit, similar decisions would have been made even upon the rest of the allegation of fact besides allegations no. 6.

[4] Error in regard to allegation no. 6 is actually the result of confusion due to vagueness of language used and not entirely baseless. From the affidavit of Ibrahim b. Mamat, the Minister of Home Affairs must have known of fact referred to in allegation no. 6 and the respondent cannot be said not to have known the time nature of the allegation. Further, a flawed 6th allegation was an error of no consequence which can be regarded as a mere surplusage.

[Appeal Allowed.]

Cases referred to:
Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri [1976] 2 MLJ 83
The Zamora [1916] 2 AC 77
Karpal Singh v. Menteri Hal Ehwal Dalam Negeri [1969] 3 MLJ 129
Liversidge v. Anderson [1942] AC 206
Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun [1988] 1 CLJ (Rep) 135
In Re Greene 1941 TLR 533

Legislation referred to:
Courts of Judicature Act 1964, s. 50(1)
Criminal Procedure Code, ss. 365, (i)(b), 374
Internal Security Act 1960, s. 8, (1)
Internal Security (Detained Persons) Rule 1960, r. 93(1)

For the applellant - Ng Aik Guan, DPP
For the respondent - Karpal Singh in person

JUDGMENT

Abdul Hamid Omar Acting LP:

In the High Court at Ipoh the respondent sought for an order of *habeas corpus*. The respondent claimed that he had been unlawfully detained under an order of the Minister of Home Affairs dated 18 December 1987 made under s. 8(1) of the Internal Security Act 1960. After hearing the application and arguments the learned Judge (Peh Swee Chin, J) granted an order directing that the respondent be released. The appeal is against that order.

The order of detention concerned reads as follows:

Internal Security Act,
1960 Detention Order
(Section 8(1))

To:

Superintendent
Protected Detention Place
Taiping

Inspector General of Police,
Bukit Aman - Kuala Lumpur

To all officers of Royal Malaysian
Police and
All other persons concerned.

That I being satisfied that this order is necessary, make against the person mentioned below with an intention of preventing the said person from acting prejudicial to:

(a) the security of Malaysia,

(b) x x x x x

(c) X X X X

Name	Identity Card Number
PEN/1282 - Karpal Singh s/o Ram Singh	1836865(B)

And that in exercising the powers conferred upon me under s. 8(1) of the Internal Security Act 1960, that I, the Minister of Home Affairs, Malaysia direct with this Order that the person whose name is stated above to be detained for a period of two years effective from 19 December 1987 at Protected Detention Place Taiping or any other place as directed by me from time to time.

Made on this 18 December 1987.

(Dr. Mahathir bin Mohamad)
Minister of Home Affairs Malaysia

(Bil. KHEDN. R.205/1182/4-) 6560

The grounds for the detention order read as follows:

That since the year 1980 until the date of arrest on 27 October 1987 you Karpal Singh a/l Ram Singh have involved in activities that would incite racial sentiments amongst the multi racial community of this country.

These activities of yours could lead to an atmosphere of tension and enmity among the races in this country and endanger the security of the country.

The particulars of the charges read as follows:

1. On 29 February 1980 while speaking in a dinner party at Silaiton Restaurant, number 4636, Jalan Pantai, Butterworth, Pulau Pinang organised by the Democratic Action Party Bagan Jermal Branch, you alleged that the Government is only interested in one race only and stressed for liberty and the rights of other races.

2. On 11 January 1982 at an emergency meeting Democratic Action Party, Penang State which was held at No. 123-D, Jalan Batu Lancang, Pulau Pinang you alleged that rights of studying one's mother tongue of non Malays is obstructed by the Government by implementing 3M curriculum. At the same meeting you also alleged that the interest and fundamental rights of Chinese and Indians are not safe guarded and requested the public specially the parents to oppose the implementation of 3M curriculum in the Chinese and the Indian primary schools.

3. On 2 March 1986 at a gathering in the compound of Kuan Im Temple, Pitt Street Pulau Pinang you quoted the case of Sim Kie Choon and Datuk Mokhtar Hashim to incite clash between the Malays and Chinese.

4. On 16 August 1986 at a forum organised by the Democratic Action Party, Pulau Pinang which was held at Kelab Ilham, No. 225, Jalan Macalister, Pulau Pinang you accused that the new economic policy is only in favour of one race i.e. the Bumiputras only.

5. On 5 September 1987 while speaking at the Arumugam Pillai Hall, Jalan Kulim, Bukit Mertajam, Pulau Pinang you alleged that the Malaysian Chinese Association (MCA Party) and the Gerakan Rakyat Malaysia had sold the fundamental rights of non-Malays to United Malay National Organisation (UMNO).

6. On 10 October 1987 at a gathering in front of Tuanku Syed Putra, Lebuh Downing, Pulau Pinang you used the issue of appointing non-mandarin qualified headmasters and senior assistants in the national type chinese primary schools to incite racial sentiments of the Chinese community.

The basic grounds for the grant of the order of *habeas corpus* by the trial Judge were set out by him in his grounds of judgment as follows:

First, it would render a dead letter, the statement of the law contained in Abdoolcader, J's passage, *supra*.

Secondly, it would set a precedent and open the floodgate to other cases in future to all other detaining authorities to plead similarly, thereby effectively causing the 3 exceptions set out by Abdul Hamid, CJ aforesaid to cease to exist altogether, the three exceptions having evolved by the dictates of justice over a long period of time through the cases.

Thirdly, there is considerable force in the submission that the Minister must be satisfied at the time of making the detention order and not later as to its necessity for same.

Fourthly, it would be open to the apparent objection or criticism later that it would amount to condoning an authority reexercising his discretion to relate back to his prior order of deprivation of some other person's liberty when the original exercise of his discretion culminating in the prior order has been found to have been affected materially by a factual error, however, unintention or innocent the error may be.

It is interesting but not essential for the Court's decision to refer to the detainee's submission that allegation of fact no. 6 was the straw that broke the camel's back; I undertook him to mean that allegation of fact no. 6 has played a crucial part in the Minister's exercise of his otherwise non-justiciable discretion or satisfaction in making the detention order. I think the detainee has struck a chord. Most of the whole nation could not have been oblivious to or could have failed to watch the issue of non-mandarin speaking headmasters mentioned in the allegation of fact no. 6 being bandied about, first in amazement, then with horror and finally with a fairly audible sigh of relief on hearing the Prime Minister's announcement on the floor of Parliament of the mass arrests and banning of public rallies.

To revert to the matter in hand, on the second ground about the erroneous allegation of fact no. 6 being outside the scope of the Act, the applicant also succeeds.

I therefore order the issue of the writ of *habeas corpus* to have the applicant brought up before the Court to be set at liberty. The applicant is therefore to be released and discharged forthwith.

They may be summarised as follows. Firstly the trial Judge considered that not to grant *habeas corpus* would render negatory what was enunciated in *Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri(1).*

The other grounds are:

(1) The Minister must be satisfied at the time of making the detention order and not later.

(2) Secondly, which is closely related to the first, the Minister should not be allowed to relate back his satisfaction;

(3) Thirdly, the trial Judge concluded that allegation of fact no. 6 played a "crucial part" in the making of the detention order.

The learned Judge thought that he found support for his view in the following passage at p. 84 in the judgment of Abdoolcader J in *Tan Boon Liat*:

I held in my judgment in *Yeap Hock Seng v. The Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279, 282, 285) that although the Courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the Courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the

> grounds furnished to the detenu are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense foreign thereto, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed
> (*Rameshwar Shaw v. District Magistrate, Burdwan & Anor.* (AIR 1964 SC 334)

With all due respect to the learned Judge he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognise that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. The learned Judge clearly misdirected himself. It was so when he said that:

> The issue of *mala fides* raised resolves itself in the final analysis into a simple and neat question: was the detention order in this case made without care, caution and proper sense of responsibility?

His whole approach to the question was in error when he proceeded to apply an objective instead of a subjective test.

As a result of this misdirection the learned Judge failed to recognise the true issue before him. The true issue before him was simply this: what was the effect of a flaw in one of the six allegations of fact. Had he appreciated the true issue before him it would have been crystal clear to him that the passage in the judgment in *Re Tan Boon Liat* had nothing to do with the case before him.

As to his other grounds for granting the order of *habeas corpus* they can be answered by going back to first principles. Since *The Zamora* [1916] 2 AC 77 Courts have come to accept that the best judge of what national security is is the authority which has the charge of security i.e. the government. Lord Parker said in that case:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

The learned Judge quoted from the judgment of Ong CJ in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 the following passage:

> I am given to understand, such vagueness or ambiguity should be regarded by this Court as intrinsic evidence - apart from criticisms of the grounds and allegations of fact supplied to the appellant - showing that the decision of the Cabinet had been made without the care and consideration that is essential where an order is made in good faith. In this connection want of good faith, of course, means no more than that, in the serious matter of depriving a citizen of his liberty without trial, there was absence of care, caution and a proper sense of responsibility. On this interpretation of *mala fides* there is no difference of opinion. If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or Minister concerned had been "satisfied". On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all which could be required for the issue of an order based on subjective satisfaction. In the final analysis, the issue is one of fact.

The omitted first sentence in the above passage is highly material for, without it, a true appreciation of what Ong CJ meant to convey is not possible. That sentence reads as follows:

Proceeding next to question the validity of the order, learned Counsel argued that the order itself was defective *ex facie* in that it was expressed to have been made "with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia/the maintenance of public order therein/the maintenance of essential services therein.

Clearly Ong CJ's observations were made in the context of the submission that s. 8 of the Internal Security Act allows a person to be detained on four grounds, that the order of detention stated three grounds in the alternative, that the grounds supplied to the detainee stated only one ground, that consequently this showed a casual and cavalier attitude on the part of the detaining authority and that in turn showed that the detaining authority had not given the matter adequate consideration and so the order of detention was invalid and the detainee's detention unlawful. It can be seen that Ong CJ was therefore not concerned with the question which confronted the learned Judge in the present case which was: where the detaining authority has relied on a number of allegations of fact and at the hearing one of them is conceded by the detaining authority to be unsustainable, can that by itself be sufficient to render the detainee's detention unlawful? It would seem that the learned Judge in this case failed to recognise that Ong CJ went on to say in the next paragraph of his judgment as follows:

In my view, when dealing with a question of fact, it will not do to wear blinkers, or to read the words of the order as strictly as one would construe an Act of Parliament or a penal or taxing statute. The grounds on which the detention order was made must be read in their proper context. The allegation, in categorical terms, was that since 1957 the appellant had consistently acted in a manner prejudicial to the security of Malaysia. In the same paper itself were to set out a series of allegations of fact. They indicate with unmistakable clarity that over a number of years till 1964 (when the appellant left these shores, a fact admitted in his own affidavit) the appellant followed a certain pattern of conduct and that since he reappeared on the Malaysian scene in March 1967 he had lost no time in involvement with the labour dispute in Bukit Asahan. After his detention he elected for a considerable time to make no representations against the detention. Taking all this into consideration, can it be said that he was ever in the dark about what, in truth, was the sole and substantive ground for his detention, or that he was so embarrassed, through ignorance of the ground for his detention, that he was unable to make proper representations? This is a question of fact which the learned trial Judge found against the appellant. Mine is a concurrent finding. Having so found I would treat the irrelevant grounds as immaterial surplusage. The appellant was not, for a moment, misled nor was he ever prejudiced thereby in any way. For my part, I see no reason to put such a strict construction on wording that the surplusage - nothing more than a technical defect - should be held to invalidate the order.

In our view the crux of the matter here is whether the learned Judge in the present case took the correct approach to the question posed before him and as has been time and again, followed by the Courts in this country (see *Liversidge v. Anderson* [1942] AC 206 followed in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* (*supra*) and *Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1988] 1 CLJ (Rep) 135. In other words reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide it and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold. In the present case the Minister filed an affidavit dated 27 January 1988 which *inter alia* contained the following:

3. From the reports and information relating to the conduct and activities of the applicant I received from the Police, I was satisfied that his detention was necessary with the view to preventing him from acting in a manner prejudicial to the security of Malaysia. Accordingly I made an order directing that he be detained for a period of two years with effect from 19 December 1987. A copy of the said detention order is annexed herewith and marked as Exhibit "MM1".

5. With regard to the allegation of fact no. 6 in para. 8 of the applicant's affidavit, I admit that the applicant was not present at the said gathering. It was due to an oversight on the part of the said Ibrahim bin Mamat to have stated otherwise in the allegations of fact served on the applicant. However, from the reports and the information relating to the conduct and activities of the applicant I received from the police, I was satisfied that, notwithstanding he was not present at the said gathering, it was necessary to detain him with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. It would not make any difference whether or not he was present at the said gathering having regard to the allegations of facts Nos. 1, 2, 3, 4 and 5 taken as a whole.

7. With regard to para. 14 of the applicant's affidavit in particular subparagraphs (v), (vi), (vii), (viii), (ix), (x) and (xv), I deny that there was any misapprehension on my part of the correct situation, that there was a total failure to apply my mind to the facts of the case or that I have in any way acted *mala fide* in making the said detention order against the applicant. I considered very carefully the facts of the applicant's case and only after I was satisfied that his detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia that I made the said detention order directing that he be detained for a period of two years.

8. With regard to para. 14(xiv), I state that his detention is still necessary with the view to preventing him from acting in a manner prejudicial to the security of Malaysia.

The Minister of Home Affairs had gone in on his affidavit to say that omitting the allegation of fact he would still have made the detention order having regard to the reports and the information relating to the conduct of the respondent upon which, no doubt, the rest of the allegations of fact were based. In our view the learned Judge in this case was bound to accept these averments in the affidavit and could not enquire into the cause of the detention. This is where the learned Judge had erred for notwithstanding the affidavit the learned Judge did in fact enqiure into the cause of the respondent's detention. The learned Judge plainly erred in applying an objective as opposed to a subjective test, contrary to the authorities cited when he concluded:

Viewed objectively, and not subjectively, the error in all the circumstances would squarely in my view amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form. The applicant should therefore succeed on this ground alone.

In passing we would like to point out that the so-called error in regard to allegation of fact no. 6 is actually the result of confusion probably caused by the vagueness of the language used. It is clear from the affidavit of Ibrahim Din Mamat that the respondent was the chairman of the DAP Penang which organised the meeting referred to in allegation no. 6. The Minister of Home Affairs must have known of this fact and the respondent cannot be said not to have known the true nature of the allegation. Therefore it is not altogether correct to say that allegation of fact no. 6 is totally baseless.

In this regard we find a passage in the judgment of Suffian FJ (as he then was) in *Karam's* case to be of direct relevance to the issue. It reads:

In my judgment detention under an order of the Minister made under s. 8 of the Internal Security Act is not illegal simply because the allegations of fact supplied to him in pursuance to Art. 151(1)(a) and s. 11 of the Act are vague, insufficient or irrelevant. I do not see any justification for reading into the Constitution or into the Act any provision to the effect that any imperfection in the allegations of fact supplied to the detainee, relates, as it were, to the original order of detention, and goes to its root, so as to render illegal the detention.

To summarise we would hold that a flawed sixth allegation of fact was an error of no consequence which can be regarded as a mere surplusage especially in view of the affidavit of the Minister of Home Affairs referred to earlier. The subjective satisfaction of the Minister of Home Affairs is not subject to judicial review.

Accordingly for the above reasons we would allow the appeal and set aside the order of the trial Judge.

Ruling on Preliminary Objections

At the hearing of the appeal, Mr. Ng Aik Guan, Deputy Public Prosecutor, raised two preliminary objections, first: to the notice of appeal filed by Mr. Karpal Singh (the respondent); second: to the presence of the respondent at the hearing of this appeal.

As for the first, it is the contention of Mr. Ng that the respondent has no right to appeal as he is not an aggrieved person under s. 374 of the Criminal Procedure Code (the Code) which states that:

> Any person aggrieved by any decision or direction of the High Court under this Chapter may appeal to the Supreme Court within thirty days from the date of the decision or direction appealed against.

Section 374 of the Code comes under Chapter XXXVI dealing with directions of the nature of a *habeas corpus* and s. 365(i)(b) under the same Chapter empowers the High Court, whenever it thinks fit, to order any person who is to be illegally or improperly detained in public or private custody to be set at liberty. The words "decision or direction" under s. 374 of the Code clearly must necessarily refer to the final decision or direction made under s. 365 of the Code. The respondent succeeded in his application and obtained an order that he be set at liberty. He is therefore not an aggrieved person to entitle him to appeal.

Our view is that the respondent is also precluded from appealing pursuant to s. 50(1) of the Courts of Judicature Act, 1964 which confers jurisdiction on the Supreme Court to hear and determine any appeal by any person convicted or otherwise found guilty by the High Court in the exercise of its original jurisdiction.

Accordingly, the respondent's appeal is hereby struck out.

As for the respondent's presence at this appeal, it was Mr. Ng's contention that in proceedings relating to an application for a writ of *habeas corpus* or any appeal in respect thereof, there is no necessity for a detainee to be present in Court. He argued that it was not proper for Peh J in the Court below to issue an order under r. 93(1) of the Internal Security (Detained Persons) Rules 1960 addressed to the superintendent to produce the respondent in Court.

Rule 93(1) reads:

> Whenever the presence of a detained person is required by any Court of civil or criminal jurisdiction such Court may issue an order addressed to the Superintendent requiring production before the Court of such person at the time and place to be named in such order, and the said Superintendant shall cause the person named in such order to be brought up as directed, and every such Court may be endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned.

The decision of Peh J to allow the respondent to be present was solely to enable the respondent to argue his own case. The learned Judge observed that the respondent's application for a writ of *habeas corpus* was an urgent application and it was to avoid an adjournment of the hearing that he allowed the presence of the respondent. He was further of the view that, in fairness, the respondent should be allowed to argue his own case.

The learned Judge therefore proceeded on the footing that it was the circumstances of that case that made him decide to allow the respondent to be present to argue his own case. So far as appears from the grounds relied upon by the learned Judge the issue turned wholly upon the question whether, on a matter of construction of r. 93(1), a detainee's preference to argue his own case was sufficient ground to allow him to be present. Generally, in cases where the issue of a writ of *habeas corpus* is sought, it is not the practice to allow the presence of a detainee. "While the Court has the right to hear any applicant in person, it will not as a rule hear in person the applicant for a writ of *habeas corpus*. There should be no departure from that practice unless sufficient ground is shown for it, and it is not sufficient ground merely that the applicant prefers to act as his own advocate." (*In Re Greene* 1941) TLR 533).

We are of the view that r. 93(1), on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil Court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the Court itself requires the presence of the detainee, for instance, where the Court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the Court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case. In the latter case, the Court must be satisfied, on an application by the detainee, that there are valid reasons for the detainee to be personally present to argue his own case. From the view, it follows that *prima facie* the power to issue an order requiring the presence of a detained person is discretionary and that being so it shall be exercised judicially. It is a matter essentially for the Court to be satisfied that it does require the presence of a detainee and that his presence is, having regard to the whole of the circumstances of the case, necessary.

Also found at [1988] 2 CLJ 587